Supreme Court, U.S.
FILED
FEB 15 1978
MICHAEL RODAK, JR., CLERK

No. 77-769

In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STEELWORKERS JUSTICE COMMITTEE,
PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.,
Solicitor General,

DREW S. DAYS, III,
Assistant Attorney General,

JOHN C. HAMMOCK,
Attorney,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-769

UNITED STEELWORKERS JUSTICE COMMITTEE,
PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of a judgment affirming the district court's denial as untimely of its motion for leave to intervene under Rule 24, Fed. R. Civ. P.

The Attorney General, on behalf of the Secretary of Labor and the Equal Employment Opportunity Commission, instituted this employment discrimination suit on April 12, 1974, in the United States District Court for the Northern District of Alabama, alleging that the defendants—nine major steel companies and the United Steelworkers of America, AFL-CIO—had engaged, nationwide, in discriminatory policies and practices that deprived the companies' minority and female employees of equal employment opportunities in violation of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. (and Supp V) 2000e, *et seq.*, and Executive Order, No. 11246, 30 Fed. Reg. 12319. The

lodging of this complaint with the district court, together with a proposed nationwide settlement agreement in the form of two consent decrees, concluded more than six months of negotiations among the federal plaintiffs and the corporate and union defendants. On the next day, the complaint was formally filed, and the district judge signed and entered the decrees (*United States* v. *Allegheny-Ludlum Industries Inc.*, 517 F. 2d 826, ~~8234~~ 834 (C.A. 5), certiorari denied, 425 U.S. 944 (hereafter *Allegheny-Ludlum I*)).

Petitioner seeks modifications of Consent Decree I, which provides for extensive seniority and other reforms to remedy continuing effects of past discrimination and for affirmative action in the form of the establishment of goals and timetables for the admission of minority and female employees to trade and craft job categories in which they have been discriminatorily underrepresented (*id.* at 834-835). The decree enjoins the defendants from discriminating on the basis of race, color, sex or national origin in any aspect of employment and from failing or refusing fully to implement the equitable remedial measures provided for (*ibid.*).[1]

Various individuals and organizations promptly moved to intervene to challenge the provisions of the consent decrees; the district court granted most of these motions, but found the challenges to be without merit. On August 18, 1975, the court of appeals in *Allegheny-Ludlum I* affirmed both the denial of intervention to one organization and the conclusion that the decrees were lawful (Pet. App. A7-A8).

---

[1]Consent Decree II, not involved here, broadly enjoins the corporate defendants from discriminating in employment and directs them to undertake affirmative action in hiring and other goals and timetables for the admission of minorities and females to supervisory and other job categories from which they have been historically excluded (*Allegheny-Ludlum I, supra*, 517 F. 2d at 835).

On January 29, 1975, while *Allegheny-Ludlum I* was pending in the court of appeals, petitioner moved in the district court to intervene in the case. That motion was denied as untimely (Pet. App. A1).[2] In an opinion on which we rely, the court of appeals affirmed (Pet. App. A5-A9), rejecting the contentions reiterated by petitioner here. That decision correctly applied established legal principles; there is no reason for further review.

1. Intervention is permissible only upon timely application. See *Commonwealth of Pennsylvania* v. *Rizzo*, 530 F. 2d 501, 504 (C.A. 3), certiorari denied *sub nom. Fire Officers Union* v. *Pennsylvania*, 426 U.S. 921. Timeliness is a factual question, addressed primarily to the discretion of the court in which intervention is sought. *NAACP* v. *New York*, 413 U.S. 345, 364-369. Both courts below properly rejected the reasons petitioner offers for its failure to seek intervention until more than seven months after the initial petition for intervention had been filed.[3]

---

[2]The court also cited the government's memorandum in opposition to the motion to intervene as affording a "further explanation * * * for denying the intervention" (Pet. App. A1-A2). That memorandum, a copy of which we are lodging with this Court, points out that petitioners have no significant legally protectable interest justifying intervention under Rule 24(a)(2), and have not shown any reason why permissive intervention under Rule 24(b) would be appropriate.

[3]Contrary to petitioner's suggestions (Pet. 8-9, 13, 14-15) that the delay in the motion to intervene resulted from a delay in implementing Consent Decree I, the conversion to a seniority system based on continuous plant service, to which petitioner primarily objects (Pet. 18), was effective no later than September 1, 1974, at the plants employing each of petitioner's 50 members named as individual applicants for intervention (Record on Appeal, pp. 16, 17-21, 154-319). The petition for intervention was not filed until January 29, 1975 (Pet. 6-7).

There is no reason why this Court should again consider these matters.[4]

As the court of appeals noted (Pet. App. A9):

> [Petitioner] offered no compelling reason for waiting until seven and a half months after the judgment and six months after implementation of the decrees to file their motion. Intervention now for the purpose of challenging the consent agreement will prejudice the appellees by jeopardizing months of negotiations, causing substantial litigation expenses, and even more substantial expenses of implementation. * * * To allow the applicants to intervene now would disrupt carefully considered proceedings.

In the absence of any showing that the denial of the motion for intervention as untimely was an abuse of discretion, that ruling should not be disturbed. *NAACP* v. *New York, supra,* 413 U.S. at 366; *Commonwealth of Pennsylvania* v. *Rizzo, supra,* 530 F. 2d at 504-507; *Hoots* v. *Commonwealth of Pennsylvania,* 495 F. 2d 1095, 1097 (C.A. 3).

---

[4]In the cases cited by petitioner (Pet. 11-17) in support of its assertions as to timeliness, the courts relied on specific factual situations, absent here, as justification for the conclusion that the motion was timely. Thus, in *United Airlines, Inc.* v. *McDonald,* No. 76-545, decided June 20, 1977, this Court emphasized the "critical fact" (slip op. 8) that McDonald had sought to intervene within the thirty-day period allowed for appeal and had thus promptly moved to intervene to protect her interests once entry of final judgment made the adverse class determination appealable and the original plaintiffs made known that they would not further appeal that ruling. In *Equal Employment Opportunity Commission* v. *American T. & T. Co.,* 506 F. 2d 735 (C.A. 3), the district court held that the motion to intervene was timely since both the complaint and the court's decree were entered on the same day, and applicants had moved to intervene less than thirty days thereafter. Finally, in *Hodgson* v. *United Mine Workers of America,* 473 F. 2d 118 (C.A. D.C.), intervention was sought before the remedy had been formulated, so no problems of disturbing a previously agreed settlement were involved.

2. Apart from the untimeliness of its motion, petitioner has identified no "significantly protectable interest" (*Rios* v. *Enterprise Ass'n Steamfitters Loc. U. # 638 of U.A.,* 520 F. 2d 352, 357-358 (C.A. 2); cf. *Patterson* v. *Newspaper & Mail Deliverers' Union of New York & Vicinity,* 514 F. 2d 767, 772-775 (C.A. 2), certiorari denied *sub nom. Larkin* v. *Patterson,* 427 U.S. 911) justifying its intervention pursuant to Rule 24. See *Franks* v. *Bowman Transportation Co., Inc.,* 424 U.S. 747, 774-775, 778; *Ford Motor Co.* v. *Huffman,* 345 U.S. 330.[5]

Citing, *inter alia, Teamsters* v. *United States,* 431 U.S. 324, petitioner's argument implies that vested seniority rights were unfairly "compromised away" by the Steelworkers Union in Consent Decree I. In *Teamsters, supra,* minority individuals were moved into the seniority positions of incumbent employees, while Consent Decree I merely converts reliance upon unit and departmental measures of continuous service to exclusive reliance upon plant continuous service. In any event, seniority systems are the product of the collective bargaining process and are subject to change through that process. The conversions contained in the consent decree here were made within the collective bargaining process,

---

[5]The two cases upon which petitioner bases its claim of a right to intervention pursuant to Rule 24(a) are inapposite. In *Patterson* v. *Newspaper & Mail Deliverers' Union of New York & Vicinity,* 514 F. 2d 767 (C.A. 2), the court did not pass on the propriety of the district court's approval of the intervention of a white non-union worker, but simply held that the district court had not abused its discretion in refusing to set aside the settlement. And in *English* v. *Seaboard Coast Line Railroad Co.,* 465 F. 2d 43 (C.A. 5), the court merely sustained the joinder, under Rule 19(b), Fed. R. Civ. P., of white employees as being within the discretion of the district court. The court did not, as petitioner implies, hold that such joinder was required or necessary in every case (see 465 F. 2d at 46, 47, 48 and n. 13).

as well as in settlement of the government's suit, and were agreed to by the union and the companies. Those parties have a right to negotiate new seniority systems for the general benefit of longer service employees as well as for the remedial benefit of minority and female employees. Such bargaining is within the scope of their powers; it is neither improper nor subject to judicial review on any basis presented by the petition. See *Ford Motor Co.* v. *Huffman, supra.* Whenever, through collective bargaining procedures, a change is made in seniority provisions, it is inevitable that some employees will be dissatisfied. But dissatisfaction alone does not invest an employee with sufficient interest to maintain a judicial challenge to seniority changes negotiated by its bargaining representative. As this Court stated in *Franks* v. *Bowman Transportation Co., Inc.,* 424 U.S. 747, 778-779.[6]

> [E]mployee expectations arising from a seniority system agreement may be modified by statutes furthering a strong public policy interest. * * * [A] collective-bargaining agreement may go further, enhancing the seniority status of certain employees for purposes of furthering public policy interests beyond what is required by statute, even though this will to some extent be detrimental to the expectations acquired by other employees under the previous seniority agreement.* * * And the ability of the union and employer voluntarily to modify the seniority system to the end of ameliorating the effects of past racial discrimination, a national policy objective of the "highest priority," is certainly no less than in other areas of public policy interest. *Pellicer* v. *Brotherhood of Ry. & S.S. Clerks,* 217 F. 2d 205 (C.A. 5 1954), cert. denied, 349 U.S. 912 * * *.

---

[6] *Franks* was cited with approval in *Teamsters* v. *United States, supra,* 431 U.S. at 347.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

DREW S. DAYS, III,
Assistant Attorney General.

JOHN C. HAMMOCK,
Attorney.

FEBRUARY 1978.